STATE OF MICHIGAN

COURT OF APPEALS

GENA SMITH and SCOTT MICHAEL SMITH,

Plaintiffs-Appellants,

v

JOHNSON CONTROLS and AMERICAN PROJECT & REPAIR,

Defendants-Appellees,

and

DENNIS BUILDING SERVICES, INC. and PENINSULA ELECTRICAL, LLC,

Defendants.

UNPUBLISHED
June 30, 2011

No. 297652
Oakland Circuit Court
LC No. 2008-091148-NO

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Plaintiffs Gena and Scott Michael Smith, husband and wife, appeal as of right the April 5, 2010, trial court order resolving the last pending claim in the case. On December 10, 2009, the court awarded summary disposition to defendants Johnson Controls, American Project & Repair ("APR"), and Dennis Building Services, Inc. ("DBS") under MCR 2.116(C)(10). On April 5, 2010, the court entered a default judgment against defendant Peninsula Electrical, LLC ("Peninsula"), resolving plaintiffs' last pending claim and closing the case. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arose out of an August 15, 2007, accident in which Gena's foot was severely injured. At the time, Gena was employed as a manager in the fine jewelry department of a J. C. Penney store located in Oakland Mall in Troy, Michigan. Inside the store are display cases of fine jewelry. Each case has a motorized display tray that can be raised and lowered. When the store closes, the display tray is lowered and a pressed board and heavy metal panel is pulled over the jewelry. The case is then locked. In that way, the jewelry is stored securely and out of sight during non-business hours. On certain days, Gena was tasked with opening the cases before the store opened and ensuring that the jewelry was properly displayed. This required unlocking the

cases with a J. C. Penney key, pulling back the boards and metal panels, and electronically raising the display trays.

In August 2007, a J. C. Penney employee discovered that the motorized display tray in one of the cases was not working correctly. Gena become aware of the problem on August 11. She did not do anything other than check the case, as another employee had already "called [the problem] in." James Hughes, a Johnson Controls' employee, received the telephone call. J. C. Penney and Johnson Controls had a facility management agreement under which Johnson Controls performed general maintenance and repair work, or otherwise secured outside vendors to do such work, for J. C. Penney stores nationwide. Hughes, who was an on-site retail technician at the store in Oakland Mall, checked the case and confirmed that it was malfunctioning. He testified that he was not trained to make any repairs on the display cases. He had never taken apart any of the cases and was not familiar with how they were put together or meant to operate. Hughes called Johnson Controls' "call center" and reported the problem, per the company's policy.

Thereafter, Johnson Controls contacted APR and submitted a work order for the display case. According to Ted Mastrucci, the president of APR, APR employees do not conduct any maintenance or repair work; rather, they coordinate hiring local vendors to do the work. In 2007, two of the companies APR used to perform maintenance and repairs were DBS and Peninsula. When APR received the work order from Johnson Controls, an APR employee contacted Peninsula to make the necessary repairs. According to their usual practice, Johnson Controls would have paid APR, and APR would have, in turn, paid Peninsula.

Two repairmen from Peninsula arrived at J. C. Penney to conduct the ordered repair work on August 14, 2007. Hughes took them to the fine jewelry department and pointed out the display case in need of repair. He watched them start work on the case and then left that part of the store to do his own work. When Hughes left the store for the day, the repairmen were still working and the case was in several pieces. Because the case was in pieces, he told Gena that the work on the case probably would not be finished that day. But he did not check in with the repairmen. Gena, however, spoke with the repairmen before she left for the day, and they indicated that the case would be fixed by the time she arrived for work the next day.

On the morning of August 15, 2007, Hughes arrived at J. C. Penney at 7:00 a.m. He did not go to the fine jewelry department. At approximately 9:30 a.m., Gena unlocked the display case that the repairmen had worked on, in preparation for the store opening at 10:00 a.m. The case appeared fully intact. It looked as it usually did, and there was nothing indicating that it should not be opened. When Gena pulled back the pressed board and heavy metal panel, however, they fell on her right foot, causing serious injuries. Gena assumed that the board and panel fell because they were not secured to the case as they normally were, and that the repairmen must have left them unattached after working on the case. There is record evidence

indicating that repairmen from Peninsula returned to J. C. Penney on August 15, after Gena's accident, and continued working on the case.[1]

In April 2008, Gena filed suit against Johnson Controls, APR, and DBS, alleging that they were negligent in allowing the display case to remain in a defective condition, failing to warn her of the dangerous condition of the case before allowing her to use it, failing to take measures to prevent an accident, and creating a hidden, inherent danger. At the time, Gena believed that repairmen from DBS, rather than Peninsula, worked on the case immediately before her accident. Thereafter, Gena twice amended her complaint, adding Michael as a plaintiff and a loss of consortium claim, and adding Peninsula as a defendant. Peninsula defaulted by failing to plead or otherwise defend itself.

In September 2009, Johnson Controls and APR filed motions for summary disposition. DBS filed a concurrence with their motions. Following a hearing, the trial court issued a December 10, 2009, opinion and order awarding summary disposition to the three defendants under MCR 2.116(C)(10). Thereafter, plaintiffs moved for entry of a default judgment against Peninsula. Following another hearing, the court granted the motion and issued a default judgment in the amount of $1 million on April 5, 2010.[2]

Plaintiffs now appeal the trial court's decision to award summary disposition to Johnson Controls and APR.

II. PLAINTIFFS' NEGLIGENCE CLAIM

Plaintiffs first argue that the trial court erred in granting Johnson Controls summary disposition of their negligence claim, particularly on the issues of duty and causation. We disagree.

We review a trial court's decision on a motion for summary disposition de novo, viewing the evidence in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden*, 461 Mich at 119. If the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id*. at 120. The non-moving party may not rely on mere allegations or denials, but must go beyond the pleadings to set forth specific facts showing a genuine issue of fact for trial. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991).

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[1] Frederick Florino, Peninsula's owner and only representative at the hearing on plaintiffs' motion for a default judgment, stated at the hearing that repairmen from Peninsula only worked on the display case after Gena's accident and that repairmen from another company must have worked on it on August 14. This was the first appearance by any representative of Peninsula, and Florino offered no support for his assertion.

[2] Plaintiffs assert on appeal that the judgment is uncollectable.

To prevail in a negligence claim, a plaintiff must prove four elements: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Plaintiffs argue that the trial court erred in concluding that Johnson Controls owed no duty to Gena. The existence of a duty is ordinarily a question for the trial court to decide as a matter of law. *Cook v Bennett*, 94 Mich App 93, 98; 288 NW2d 609 (1979). If the question of duty involves no disputed factual issues, and the court concludes that a defendant owes the plaintiff no duty, summary disposition is proper. *Id*. We review de novo a trial court's determination whether a defendant owes a duty toward a plaintiff. *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 465; 708 NW2d 448 (2005).

According to plaintiffs, Johnson Controls owed Gena a duty to "make the store safe and inspect contractors' work." Plaintiffs argue that Johnson Controls breached this duty when Hughes failed to inspect Peninsula's work when he arrived at the store on the morning of August 15 or to otherwise contact Peninsula that morning to determine whether the repairs were complete and had been completed properly. Plaintiffs further argue that Hughes should have then warned Gena about the dangerous condition of the case.

Essentially, plaintiffs assert that Johnson Controls had a duty to warn or otherwise protect a third party. This Court has clearly defined when such a duty exists stating that, there is a "general common-law rule that no individual has a duty to protect another who is endangered by a third person's conduct absent 'a "special relationship" either between the defendant and the victim, or the defendant and the third party who caused the injury.'" *Beaudrie v Henderson*, 465 Mich 124, 141; 631 NW2d 308 (2001) (citation omitted). Public policy determines whether a special relationship exists. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). The courts of this state have recognized several special relationships, including, among others, a common carrier and passengers, an innkeeper and guests, *id*., a proprietor and patrons, *Graves v Warner Bros*, 253 Mich App 486, 494; 656 NW2d 195 (2002), a rescuer and a victim, *Madley v Evening News Ass'n*, 167 Mich App 338, 341; 421 NW2d 682 (1988), and a physician and patient, *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20; 780 NW2d 272 (2010).

In *Williams*, our Supreme Court explained:

> The rationale behind imposing a duty to protect in these special relationships is based on control. In each situation one person entrusts himself to the control and protection of another, with a consequent loss of control to protect himself. The duty to protect is imposed upon the person in control because he is best able to provide a place of safety. [*Williams*, 429 Mich at 499.]

A special relationship must be sufficiently strong to require a defendant to take action to benefit the other party. *Samson v Saginaw Prof Bldg, Inc*, 393 Mich. 393, 406; 224 NW2d 843 (1975).

Other factors are relevant to determining whether a special relationship exists:

[T]his Court has held that it is necessary to

> balance the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, and the relationship between the parties. Other factors which may give rise to a duty include the foreseeability of the [harm], the defendant's ability to comply with the proposed duty, the victim's inability to protect himself from the [harm], the costs of providing protection, and whether the plaintiff had bestowed some economic benefit on the defendant. [*Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 9; 492 NW2d 472 (1992) (citations omitted).]

Generally, a person who hires an independent contractor is not liable for harm caused to another by the independent contractor or its servants, *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004); *Ormsby v Capital Welding, Inc*, 471 Mich 45, 48, 53; 684 NW2d 320 (2004); exceptions include violation of safety regulations, *Riddle v McLouth Steel Prods*, 440 Mich 85, 103; 485 NW2d 676 (1992), the involvement of inherently dangerous work, *DeShambo*, 471 Mich at 31, and common work areas, *Ormsby*, 471 Mich at 49. Under the latter exception, there must have been a common work area, a readily observable, avoidable danger in that work area that created a high risk to a significant number of workers, and a general contractor, or property owner acting as a general contractor, with supervisory and coordinating authority that failed to take reasonable steps within its authority to guard against that danger. *Id*. at 54. Absent an exception, a person who hires an independent contractor has no duty to investigate the contractor and may assume that the contractor is competent. *Reeves v Kmart Corp*, 229 Mich App 466, 476-477; 582 NW2d 841 (1998).

Here, Johnson Controls was responsible for securing an outside vendor to repair the display case and, through APR, hired Peninsula to make the necessary repairs.[3] Thus, absent an applicable exception, Johnson Controls must not be held liable for the negligence of Peninsula's workers. See *DeShambo*, 471 Mich at 31; *Ormsby*, 471 Mich at 48. There is no evidence of a safety regulation violation or an inherently dangerous activity in this case. Nor do plaintiffs argue that the common work area exception applies here, although they do in essence assert that Hughes had supervisory and coordinating authority over Peninsula's workers and failed to take reasonable steps within that authority to guard against the dangerous condition of the display case. See *Ormsby*, 471 Mich at 54. In asserting that Hughes had such authority over Peninsula's workers, plaintiffs point to the facility management agreement between J. C. Penney and Johnson Controls, which generally states that Johnson Controls is responsible for the maintenance of J. C. Penney stores and does not specifically describe Johnson Controls' authority over independent contractors. Although Johnson Controls coordinated the hiring of Peninsula through APR, there is no evidence that Hughes or any other Johnson Controls representative exercised authority over Peninsula's workmen. Hughes testified that his only interaction with the workmen was to take them to the jewelry department and indicate what was in need of repair. Thus, it is not clear that Hughes failed to take reasonable steps *within his*

[3] Johnson Controls refers to itself as a general contractor and to Peninsula as a subcontractor. On appeal, plaintiffs do not dispute Johnson Controls' use of such terminology.

authority to guard Gena from danger. Further, even if plaintiffs' assertions were accepted as true, there is no evidence that the dangerous condition in this case was "readily observable." See *id*.; see also *Ghaffari v Turner Constr Co*, 473 Mich 16, 22; 699 NW2d 687 (2005) (stating that there is essentially no difference between the phrases "open and obvious" and "readily observable and avoidable"). In fact, Gena testified and plaintiffs emphasize on appeal that the condition was *not* readily observable. According to Gena, before she opened the display case on the morning of August 15, it appeared as it usually did and there was nothing indicating that the board and metal panel should not be pulled back. Gena did not expect the board and metal panel to fall, and there is no evidence that Hughes had any reason to know the repairmen would leave the board and metal panel unattached, in a manner that looked as though they were, or that any part of the display case was in danger of falling. Accordingly, the common work area exception is inapplicable here.

Plaintiffs argue that Johnson Controls owed Gena a common law duty to keep the jewelry department safe, oversee Peninsula's work, and warn her of any dangers posed by the work. But as indicated, the common law does not impose a duty on general contractors to safeguard third parties from the acts of subcontractors, absent applicable exceptions. Plaintiffs ignore the alleged general contractor/subcontractor relationship between Johnson Controls and Peninsula and simply assert that a special relationship existed between Gena and Johnson Controls because Gena entrusted herself to Hughes, who she relied upon to have the display case repaired and her work area made safe, and in so doing, gave up her own ability to protect herself. Plaintiffs do not explain their cursory assertion that Gena entrusted herself to Hughes, with a consequent loss of control to protect herself. We note that according to Hughes' testimony, he was unfamiliar with how the display cases were put together or meant to operate; whereas, according to Gena's testimony, although she did not know exactly how the cases were put together, she was at least somewhat familiar with the way they were designed to operate and she regularly operated the mechanisms inside them, i.e., by moving the boards and metal panels and raising and lowering the display trays. Given this evidence, plaintiffs cannot establish that Gena gave up all ability to protect herself to Hughes. See *Williams*, 429 Mich at 499; *Dykema*, 196 Mich App at 9. She was able to casually inspect the display case before pulling back the board and metal panel and, based on her experience, determine whether the case at least appeared to be in a safe condition.

Even if it could be established that Gena gave up control, or at least some control, to Johnson Controls because of its general responsibility to maintain J. C. Penney stores, another element relevant to determining whether a duty exists is the foreseeability of the harm. See *Dykema*, 196 Mich App at 9. In its opinion and order, the trial court held that Johnson Controls had no notice of the dangerous condition, "nor was it foreseeable that [Peninsula] would assemble the display cabinet in a manner that would create the appearance of a completed repair and disguise the fact that the security doors[, i.e., the board and metal panel,] were not properly installed on their hinges." We agree. As indicated, nothing looked abnormal about the condition of the case, and Hughes had no reason to know that the repairmen would leave the board and metal panel unattached, in a manner that looked as though everything was put together as normal, or that any part of the case was in danger of falling. On the issue of foreseeability, plaintiffs argue that "[h]ad the contractor [Hughes] done his job . . . and either inspect[ed] the work upon his arrival at the store or [made] a simpl[e] phone call to the contractor [Peninsula], it could have been determined that the work had not been completed or had been done improperly." This is a circular argument. Plaintiffs cannot establish that Johnson Controls had a

duty to protect Gena from harm because the harm was foreseeable by arguing that had Johnson Controls fulfilled its duty, it would have known about the risk of harm.

Moreover, as Johnson Controls points out, any supervisory role that it may have had over Peninsula's workers—including any duty to control the workers' actions, inspect their work, or inquire whether they had completed their work and if the work had been done properly—were duties imposed by contract, not by common law. Our Supreme Court explained in *Fultz v Union-Commerce Assocs*, 470 Mich 460, 466; 683 NW2d 587 (2004), that duties arising solely under a contract are not actionable in tort.[4] In *Fultz*, the plaintiff slipped and fell in a parking lot. *Id*. at 462. She later sued the contractor that had been hired to remove snow from the parking lot for failing to properly clear the lot. *Id*. On appeal, the Supreme Court considered whether a plaintiff can establish a duty where the duty arises solely from a contract to which she was not a party. *Id*. at 463. The Court instructed that courts should determine whether "the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id*. at 467. Applying that test to the facts of the case, the Court determined that because the contractor had no duty to clear the lot outside that imposed by the contract, it could not be liable in tort for failing to properly clear the lot. *Id*. at 468. Here, any duty Johnson Controls had to ensure that the display case had been properly repaired was imposed by the facility management agreement between J. C. Penney and Johnson Controls. Plaintiffs do not assert that the duties Johnson Controls allegedly owed Gena were separate and distinct from its contractual duties, and to the extent Johnson Controls breached such duties, it may not be held liable in tort.

We affirm the trial court's conclusion that plaintiffs cannot establish the duty element of their negligence claim. Because we find that no duty was owed to plaintiff, we need not address causation.

III. PLAINTIFFS' THIRD-PARTY BENEFICIARY CLAIM

Plaintiffs next argue that the trial court erred in concluding that Gena was not a third-party beneficiary to the subcontractor insurance provision of the facility management agreement. We agree with the trial court.

Section 18.2 of the facility management agreement between J. C. Penney and Johnson Controls states:

> 18.2 Subcontractor Insurance
>
> If any portion of the Services is to be subcontracted, [Johnson Controls] shall require each subcontractor to maintain and furnish it with satisfactory evidence that each such subcontractor is maintaining Workers' Compensation, Employers'

[4] The Court recently clarified its ruling and analysis in *Fultz* in *Loweke v Ann Arbor Ceiling & Partition Co*, __ Mich __; __ NW2d __ (2011).

> Liability and such other forms and amounts of insurance as [Johnson Controls] deems reasonably adequate.

Plaintiffs argue that Gena, although not a party to the facility management agreement, was a third-party beneficiary to the subcontractor insurance provision of the agreement, that Peninsula was, presumably, uninsured at the time of Gena's accident[5] and, therefore, that Johnson Controls breached its duty to ensure that all subcontractors were insured. Plaintiffs raised this argument for the first time in response to Johnson Controls' motion for summary disposition. In awarding Johnson Controls summary disposition, the trial court held that Gena could not be a third-party beneficiary to the agreement under *Fultz*. But the holding in *Fultz* does not specifically apply to third-party beneficiary claims. See *Fultz*, 470 Mich at 463. Reversal is not warranted, however, where a trial court reaches the right result, even for the wrong reason. *H A Smith Lumber & Hardware Co v Decina (On Remand)*, 265 Mich App 380, 385; 695 NW2d 347 (2005).

> MCL 600.1405 governs the rights of third-party beneficiaries and states, in part:
>
> Any person for whose benefit a promise is made by way of contract, as hereinafter defined, has the same right to enforce said promise that he would have had if the said promise had been made directly to him as the promise.
>
> (1) A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise had undertaken to give or to do or refrain from doing something directly to or for said person.

Our Supreme Court has interpreted this statutory language as follows:

> In describing the conditions under which a contractual promise is to be construed as for the benefit of a third party to the contract in § 1405, the Legislature utilized the modifier "directly." Simply stated, section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. [*Koenig v South Haven*, 460 Mich 667, 676-677; 597 NW2d 99 (1999).]

The Court has also explained that "a third-party beneficiary may be a member of a class, but the class must be sufficiently described." *Id*. at 680. "An objective standard is to be used to determine from the contract itself whether the promisor undertook 'to give or to do or to refrain from doing something *directly* to or for' the putative third-party beneficiary." *Brunsell v*

[5] Plaintiffs have not presented any evidence that Peninsula was actually uninsured.

Zeeland, 467 Mich 293, 298; 651 NW2d 388 (2002) (citation omitted, emphasis added by *Brunsell*).

Plaintiffs cannot establish that the language of the subcontractor insurance provision demonstrated an undertaking by Johnson Controls directly for the benefit of Gena or a sufficiently described class that would include Gena. According to plaintiffs, in including the provision in the facility management agreement, J. C. Penney must have intended that its employees have insurance coverage in the event that one of its employees, such as Gena, was injured as a result of subcontractor negligence. But Gena is not named in the provision, nor is there any reference to J. C. Penney employees in the provision. The provision requires Johnson Controls to ensure that each of its subcontractors maintains "Workers' Compensation, Employers' Liability and such other forms and amounts of insurance as [Johnson Controls] deems reasonably adequate." Considering this plain language, which includes the terms "Workers' Compensation" and "Employers' Liability," the provision is primarily meant to ensure that Johnson Controls' subcontractors maintain insurance coverage in the event that one of the subcontractors' own employees falls ill or is injured in the course of his or her employment. Gena was an employee of J. C. Penney, not one of Johnson Controls' subcontractors, and viewing the plain language of the provision objectively, plaintiffs cannot establish that the provision was meant to directly benefit Gena in the way that plaintiffs argue. While the provision may have been of benefit to J. C. Penney, any benefit to Gena was merely incidental. Accordingly, plaintiffs' third-party beneficiary claim must fail.

IV. PLAINTIFFS' DISCOVERY ARGUMENT

Plaintiffs finally argue that the trial court's award of summary disposition was premature because discovery was incomplete. We disagree.

A motion for summary disposition filed before the close of discovery is premature unless there is no fair likelihood that further discovery will yield support for the nonmoving party's position. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). However, "'[i]f a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence.'" *Davis v Detroit*, 269 Mich App 376, 379-380; 711 NW2d 462 (2006) (citation omitted). "Mere conjecture does not entitle a party to discovery, because such discovery would be no more than a fishing expedition." *Id*. at 380. We review a trial court's decision regarding discovery for an abuse of discretion. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004).

Plaintiffs assert that they should have been permitted to depose representatives from Peninsula before summary disposition was awarded in this case. According to plaintiffs, APR claimed in its motion for summary disposition that Peninsula was an independent contractor, but Peninsula's status had not been conclusively established at that time and the trial court "improperly took the word of the representatives from" APR on the issue; there was a sample invoice attached to plaintiffs' brief in opposition to APR's motion for summary disposition, which indicated that APR sent invoices for repair work directly to Johnson Controls, suggesting that APR, not Peninsula, may have repaired the display case; a letter from APR's counsel to plaintiffs' counsel, which was also attached to plaintiffs' brief in opposition, stated that APR

dealt directly with J. C. Penney personnel and not with Johnson Controls; and, apparently, Johnson Controls has a contractual relationship with APR and APR is required to provide insurance coverage for work performed at J. C. Penney stores. Plaintiffs assert that "[g]iven the conflicting evidence, [they], at a minimum should have been given the opportunity to find and depose representatives from Peninsula . . . , not only to shed light on the relationships of the parties, but as to whether representatives of Johnson Controls might have been negligent on the morning of August 15, 2007."

Plaintiffs are correct that there has been some confusion over the course of the proceedings about the relationships of the parties. Initially, plaintiffs believed that DBS repaired the display case on August 14. But they later determined that Peninsula did the repair work. Plaintiffs now assert that it is possible APR, not Peninsula, repaired the display case. Plaintiffs point to the sample APR invoice billing Johnson Controls for repair work. But Mastrucci, the president of APR, clarified that APR employees do not do any repair work. APR's usual practice is to bill the customer; in this case, Johnson Controls. The customer pays APR and APR, in turn, pays the company that actually makes the repairs; in this case, Peninsula. Plaintiffs have not come forth with any independent evidence that Mastrucci's testimony and explanation of the invoice was incorrect. Further, the evidence of record supports the conclusion that J. C. Penney had a contractual relationship with Johnson Controls and Johnson Controls had a contractual relationship with APR. All of the parties have made their arguments, at the trial court level and on appeal, as if that were the case. The only issue that is not perfectly clear in the record is whether APR dealt directly with J. C. Penney in regard to particular repair projects. The letter from APR's counsel and Mastrucci's testimony suggest that, at times, APR did deal directly with J. C. Penney; Hughes' testimony, however, indicates the contrary. But plaintiffs have not explained why such a question of fact would be *material* to deciding defendants' motions for summary disposition.

Plaintiffs have not presented any affidavits or other independent evidence that further discovery, particularly deposing representatives from Peninsula, would yield support for their position. *Liparoto Constr, Inc*, 284 Mich App at 33-34; *Davis*, 269 Mich App at 379-380. Plaintiffs' assertions are nothing more than conjecture and permitting additional discovery "would be no more than a fishing expedition." *Davis*, 269 Mich App at 380. Therefore, we conclude that the trial court's award of summary disposition was not premature.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering